IN THE

Supreme Court of the United States

October Term, 1950.

No. 399.

JACK H. BREARD,
Appellant,

v.

CITY OF ALEXANDRIA,
Appellee.

Appeal From the Supreme Court of the State of Louisiana.

BRIEF FOR APPELLANT.

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MISCELLANEOUS.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The City Court of Alexandria Ward, Rapides Parish, Louisiana, did not render a written opinion. That Court merely overruled the appellant's Motion to Quash and, thereafter upon a trial based upon the Stipulation of Facts found the appellant guilty (R. 5). The opinion of the Supreme Court of Louisiana (R. 17) is reported in 217 La. 820, 47 So. (2nd) 553.

JURISDICTION.

The final judgment of the Supreme Court of Louisiana —the highest court of the state—was entered on June 30, 1950 (R. 17). The final judgment sustained the validity of an ordinance of the City of Alexandria, Louisiana, known as **Penal Ordinance No. 500**, against appellant's contention that such ordinance was repugnant to the Constitution of the United States.

The jurisdiction of the Supreme Court to review the final judgment of the Supreme Court of Louisiana by appeal is conferred by Title 28, **United States Code**, Section 1257, which provides, in so far as is applicable here, as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * *
>
> "2. By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validit[illegible]."

The reference in Section 1257 (2) to a "statute of any state" has been construed to include "municipal ordinances": **King Manufacturing Company v. City Council of Augusta**, 277 U. S. 100, 102 (1928); **Jamison v. Texas**, 318 U. S. 413, 414 (1943); and **Independent Warehouses, Inc. v. Scheele**, 331 U. S. 70 (1947).

A Petition for Appeal to the Supreme Court of the United States, together with the other requisite papers, was presented to the Honorable John B. Fournet, Chief Justice of Supreme Court of Louisiana, on September 25, 1950, and was by him allowed the same day (R. 24, 27). This court entered an order noting probable jurisdiction in this case on December 11, 1950 (R. 30).

QUESTIONS PRESENTED.

Penal Ordinance No. 500 of the City of Alexandria, Louisiana, makes it a misdemeanor for solicitors and others to call at a residence for a business interview without having previously secured an invitation from the occupant. Appellant, having his headquarters at Dallas, Texas, is a regional representative of Keystone Readers Service, Inc., having its main office in the City of Philadelphia, Pennsylvania, and was arrested while going from door-to-door in the City of Alexandria, soliciting subscriptions for nationally known magazines solely because he had not obtained the prior consent required by Penal Ordinance No. 500. Keystone is engaged on a national scale in house-to-house solicitation of subscriptions for lawful magazines under contract with various publishers, all of whom are located outside of Louisiana (R. 7).

Three main constitutional questions are presented by this appeal.

1. Whether said ordinance violates the Due Process Clause of the Fourteenth Amendment because the ordinance arbitrarily, unreasonably and unduly burdens and curtails and, in effect, denies the fundamental right of the appellant and others similarly situated to engage in a lawful private business or occupation.

2. Whether said ordinance, as applied to appellant and others similarly situated, imposes an undue or discriminatory burden upon interstate commerce, and in effect is tantamount to a prohibition of such commerce, in violation of Art. I, Section 8, Clause 3 of the Constitution of the United States.

3. Whether said ordinance, as applied to appellant and others similarly situated, violates Amendments I and XIV to the Constitution of the United States, in that it abridges the freedom of speech or of the press because it places an arbitrary, unreasonable and undue burden upon a well established method of distribution and circulation of lawful magazines and periodicals; and, in effect, is tantamount to a prohibition of the utilization of such method.

STATUTE (MUNICIPAL ORDINANCE) INVOLVED.

The statute, the validity of which is involved, is a municipal ordinance of the City of Alexandria, Louisiana. This ordinance, which was adopted in its present form October 6, 1947, is known as "**Penal Ordinance No. 500**". The ordinance is not printed in any official edition, but appears in the stipulation of facts as Exhibit A (R. 11). The provisions of the ordinance, which are pertinent to the present case, are contained in Sections 1 and 2, which read as follows:

> "Section 1. Be it Ordained by the Council of the City of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.
>
> "Section 2. Be it Further Ordained, Etc., that any person violating the provisions of this ordinance shall upon conviction thereof be fined not more than $100.00 or imprisoned not more than 30 days or both fined and imprisoned in the discretion of the Court."

Section 3 provides that the ordinance does not apply to "the sale, or solicitation of orders for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden products". The present case raises no objection to this section. Section 4 provides that the "ordinance shall go into effect immediately upon its passage", and Section 5 repeals "all ordinances or parts of ordinances in conflict", with such ordinance.

STATEMENT OF CASE.

Jack H. Breard was arrested on June 28, 1949, while going from door-to-door in the City of Alexandria, Louisiana, soliciting subscriptions for nationally known magazines solely on the ground that he had not obtained the prior consent of the owners or occupants of such residences required by Penal Ordinance No. 500 (R. 7).

Such ordinance prohibits, *inter alia*, the practice of going in and upon residences in the city by solicitors without the prior consent of the owners or occupants of such residences for the purpose of soliciting orders for the sale of goods, wares and merchandise. Such solicitation without prior consent is declared a nuisance and is made punishable as a misdemeanor (R. 6, 11).

The case was submitted to the City Court of Alexandria Ward, Rapides Parish, Louisiana, upon an agreed Statement of Facts (R. 5, 6), which, for the convenience of the court, we will briefly summarize.

Jack H. Breard, a resident of and having his headquarters at Dallas, Texas, is a regional representative of Keystone Readers Service, Inc., a Pennsylvania corporation, with its main office in the City of Philadelphia, Pennsylvania (R. 7, 11).

Keystone is and has been engaged on a national scale in house-to-house solicitation of subscriptions for nationally known magazines and periodicals, including, among others, The Saturday Evening Post, Ladies Home Journal, Country Gentlemen, Newsweek, etc. Keystone operates under contracts with the publishers of such magazines and periodicals, all of whom are located and publish their magazines and periodicals outside of the State of Louisiana (R. 7).

Keystone in the furtherance of its business has divided the United States into nine regional areas, each of which

is in charge of a franchised regional representative, who in turn, utilizes crews of solicitors who go from house-to-house in various cities and towns in their regional areas and solicit subscriptions for such magazines and periodicals. Such solicitors are not permanently assigned to any particular city or town but move from locality to locality in their regional area spending one or two days in each city or town depending upon its size (R. 7, 9).

Neither the appellant nor any of the solicitors of Keystone at any time make deliveries of any magazines or periodicals. Each subscription order is sent by mail through the main office of Keystone to the proper publisher who, upon acceptance of same, sends the particular magazines or periodicals by mail directly to the new subscriber (R. 9, 10).

House-to-house subscription solicitation plays an indispensable and important role in the distribution and circulation of the American periodical press, regularly accounting for from 50% to 60% of the total annual subscription circulation of nationally distributed magazines, and more than 30% of the total amount of the annual circulation per issue of such magazines (R. 10).

On June 28, 1949, a crew of Keystone solicitors arrived in the City of Alexandria, Louisiana, for the purpose of house-to-house solicitation. The appellant was in charge of this crew and was engaged in such house-to-house solicitation at the time of his arrest (R. 10).

Appellant duly filed a motion to quash (R. 2) on three basic constitutional grounds, namely, that the ordinance violates the Due Process Clauses of the Constitution of Louisiana and of the Fourteenth Amendment to the Constitution of the United States; that the ordinance, as applied to appellant and other solicitors similarly situated, violates the Commerce Clause (Art. I, Section 8, Clause 3) of the Constitution of the United States; and that the

ordinance, as applied to appellant and other solicitors similarly situated, violates Art. I, Section 3 of the Constitution of the State of Louisiana and Amendments I and XIV to the Constitution of the United States guaranteeing freedom of speech and of the press.

The appellant's motion to quash was overruled by the City Court and he was found guilty and fined $25.00 or thirty days (R. 1, 5).

The appellant seasonably filed his appeal from the City Court to the Supreme Court of Louisiana. In his "Specification of Errors", the appellant raised the same constitutional objections mentioned above (R. 5, 6).

The National Association of Magazine Publishers, Inc.,—a trade association of the magazine publishing industry—submitted a brief as *amicus curiae*, pursuant to leave granted by the Supreme Court of Louisiana.

The Supreme Court of Louisiana affirmed appellant's conviction and in so doing expressly rejected the above constitutional objections and sustained the validity of Penal Ordinance No. 500 (R. 17).

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Louisiana erred (R. 25):

1. In holding and deciding that Penal Ordinance No. 500 of the City of Alexandria, Louisiana, which prohibits the practice of making uninvited visits to private residences by solicitors, does not violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, because the ordinance arbitrarily, unreasonably and unduly burdens and curtails and, in effect, denies the fundamental right of appellant and others similarly situated to engage in a lawful private business or occupation.

2. In holding and deciding that said Penal Ordinance No. 500, as applied to appellant and other solicitors similarly situated, does not impose an undue and discriminatory burden upon interstate commerce and, in effect, is not tantamount to a prohibition of such commerce, in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

3. In holding and deciding that said Penal Ordinance No. 500, as applied to appellant and other solicitors similarly situated, does not violate Amendment I and Amendment XIV, Section 1, to the Constitution of the United States, in that it abridges freedom of speech or of the press because it places an arbitrary, unreasonable and undue burden upon a well established method of distribution and circulation of lawful magazines and periodicals, and, in effect, is tantamount of a prohibition of the utilization of such method.

4. In sustaining the constitutionality of Penal Ordinance No. 500 and in sustaining the conviction of appellant for violating such ordinance; and in entering its final judgment and decree of June 30, 1950, with the above force and to the above effect.

SUMMARY OF ARGUMENT.

Appellant was arrested on June 28, 1949 (and subsequently was convicted) while going from door-to-door in the City of Alexandria, Louisiana, soliciting subscriptions for nationally known magazines solely on the ground that he had not obtained the prior consent of the owners or occupants of such residences as required by Penal Ordinance No. 500 (R. 7). Appellant is a regional representative of Keystone Readers Service, Inc., a Pennsylvania corporation with its main office in the City of Philadelphia, Pennsylvania. Keystone engages in house-to-house subscriptions for nationally known magazines and periodicals and operates under contracts with the publishers of such magazines, all of which are printed and published in various states other than Louisiana (R. 7, 11).

Appellant's contentions that Penal Ordinance No. 500 violates the Constitution of the United States in various particulars may be summarized as follows:

(1) The ordinance violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that it arbitrarily, unreasonably and unduly burdens and curtails, and, in effect, denies the fundamental right of the appellant and others similarly situated to engage in a lawful private business or occupation. The ordinance is aimed at the interstate direct selling method of doing business. In its practical effect, the ordinance is prohibitive and not regulatory in nature because the requirement of securing the prior consent of householders is an insurmountable hurdle to house-to-house solicitations. This is particularly true of itinerant solicitors, like appellant.

(2) The ordinance, to the extent that it applies to solicitors, like appellant, who solicit orders for the purchase of goods (magazines in the present case) subsequently to be shipped interstate to the customer, violates

the Commerce Clause of the United States Constitution. This is true, because the practical operation of the ordinance, as applied to appellant and others similarly situated, imposes an undue and discriminatory burden upon interstate commerce and in effect is tantamount to a prohibition of such commerce. In view of the exclusionary and prohibitive effects of the ordinance on interstate direct selling, the ordinance is discriminatory against interstate commerce in favor of local competing business.

(3) The ordinance, as applied to appellant and other solicitors of subscriptions for local magazines and periodicals, violates the First and Fourteenth Amendments to the Constitution of the United States in that it abridges the freedom of speech and of the press. This is true because the ordinance places an arbitrary, unreasonable and undue burden upon a well established and essential method of distribution and circulation of lawful magazines and periodicals and, in effect, is tantamount to a prohibition of the utilization of such method. House-to-house solicitation of subscriptions for lawful magazines and periodicals, forms a vital and integral part of the process of distributing and circulating the American Periodical Press, regularly accounting for from 50 to 60 per cent of the total annual subscription circulation of nationally distributed magazines, and more than 30 per cent of the total amount of the annual circulation per issue of such magazines (R. 10).

Argument.

Appellant submits that Penal Ordinance No. 500 of the City of Alexandria, Louisiana, is invalid in that it violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; that the ordinance, as applied to appellant and other solicitors similarly situated, violates the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States; and that the ordinance, as applied to appellant and other solicitors similarly situated, abridges the freedom of speech and of the press guaranteed by Amendments I and XIV to the Constitution of the United States. After briefly discussing the nature and origin of the ordinance, we shall discuss the constitutional objections under appropriate headings.

I.

NATURE AND ORIGIN OF ORDINANCE.

The ordinance in question prohibits solicitors, peddlers, hawkers and itinerant merchants from going upon the premises of private residences for the purpose of either peddling or soliciting sales of goods, wares and merchandise without first having obtained the prior consent of the owners or occupants of such residences. Such peddling or solicitation without prior consent is declared to be a nuisance and is punishable as a misdemeanor.[1]

The ordinance is set forth in full in the record (R. 11) however, for purpose of ready reference, we will set forth the main part of the ordinance which reads as follows:

"'Section 1. Be It Ordained by the Council of the City of Alexandria, Louisiana, in legal session

1. The ordinance was adopted in its present form October 6, 1947 (R. 6). In its original form the ordinance did not declare uninvited peddling and soliciting to be a nuisance. See **Breard v. City of Alexandria**, 69 F. Supp. 722 (D. C. W. D. La., 1947).

convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.'"

The ordinance is a so-called Green River Ordinance because it is patterned upon an ordinance originally promulgated by the Town of Green River, Wyoming (R. 10). As pointed out in **City of Mt. Sterling v. Donaldson Baking Co.**, 287 Ky. 781, 155 S. W. 2d 237 (1941) at page 783:

> "Similar ordinances have been enacted by other cities and so many state and federal courts have had the ordinance before them that the Green River Ordinance now has a definite place in the judicial parlance of the United States."

The Green River Ordinance has become very fashionable. As the record shows (R. 10), Green River Ordinances were enacted in over 400 cities throughout the nation during the period 1935-1939.[2] While the exact number of such ordinances enacted since 1939 is not known, many additional cities and towns have enacted such ordinances since 1939, particularly since World War II. Practically every city and important town in the State of Louisiana has adopted such an ordinance (R. 10).

The primary reason for the popularity of the Green River type of ordinance is due to the fact that it curbs

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2. See also article entitled "**Municipal Legislative Barriers to a Free Market**", McIntire and Rhyne, 8 **Law and Contemporary Problems**, (Duke University) (1941) at page 374.

interstate direct selling in favor of local competing business.[3]

The Green River Ordinances have been before the courts many times. As will more fully appear later, a few courts have sustained such ordinances as a valid exercise of the police power; however, a great majority of the courts have held such ordinances to be invalid as an unwarranted and arbitrary exercise of the police power.

II.

ORDINANCE VIOLATES THE DUE PROCESS CLAUSE.

Appellant submits that Penal Ordinance No. 500 violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that it arbitrarily, unreasonably and unduly burdens and curtails, and, in effect, denies the fundamental right of the appellant and others similarly situated to engage in a lawful private business or occupation.

In approaching this question certain cardinal principles must be borne in mind.

The Due Process Clause of the Fourteenth Amendment does not prohibit state or municipal regulation under the police power for the public welfare; however, the amendment does condition the exertion of the police power by requiring that the end shall be accomplished by methods

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3. See article by A. L. Jensen, "**Burdening Interstate Direct Selling under Claims of State Police Power**", 12 Rocky Mountain Law Review 257. Mr. Jensen in discussing the Green River type of ordinance stated at page 269: "* * * A careful investigation in numerous cities in which the Green River ordinance has been passed has, without exception, revealed that it was not the citizens generally but the local retailers who initiated and lobbied the ordinance to adoption. This vital fact * * * reveals the true purpose and effect of the Green River ordinance . . ." See also Hearings before the **Temporary National Economic Committee**, 76th Cong. 2d Sess. Pt. 29, pp. 15967-975.

consistent with due process. "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." **Nebbia v. New York**, 291 U. S. 502, 521 (1934).

While the police power may be utilized to prohibit a type of business which is inherently or actually harmful to the public, it may not be utilized arbitrarily to prohibit a harmless and legitimate type of business or occupation; **Nebbia v. New York**, 291 U. S. 502, 528 (1934); **Murphy v. California**, 225 U. S. 323, 329 (1912); **Liggett Company v. Baldridge**, 278 U. S. 105, 113 (1928).

Also, in passing upon constitutional questions this court has regard to substance and not to mere matters of form, and, in accordance with familiar principles, a statute must be tested by its operation and effect. **Near v. Minnesota**, 283 U. S. 697, 708 (1931).

The Green River type of ordinance has been described as "perhaps the most drastic local regulation directed at a particular method of doing business".[4] Indeed, the ordinance in practical operation is prohibitory rather than regulatory in nature. The requirement of securing the prior consent of householders is an insurmountable hurdle to house-to-house solicitors. The ordinance does not specify how this prior consent must be obtained; however, the ordinance in question has been interpreted to require the prior consent to be obtained by the utilization of the mail or the telephone. See **Breard v. City of Alexandria**, 69 F. Supp. 722 (1947) at page 726, the reasoning of which was adopted and cited with approval by the Supreme Court of Louisiana in **City of Alexandria v. Jones**, 216 La. 923, 45 So. (2d) 79 (1950). In **Town of Green River v. Bunger**, 50 Wyo. 52, 58

4. See article entitled "**Municipal Legislative Barriers to a Free Market**", McIntire and Rhyne, 8 **Law and Contemporary Problems**, Duke University (1941) page 361.

Pac. (2d) 456 (1936), appeal dismissed, 300 U. S. 638, an identical ordinance was held to preclude a solicitor from going to a house for the purpose of obtaining such prior consent.

Accordingly, any attempt to procure the prior consent required by the ordinance would require the extensive use of the mail, or the telephone, or both. The resulting inordinate amount of time, effort and expense would eliminate any financial return from the solicitation effort. In addition, any such attempt to procure the prerequisite consent required by the ordinance would be completely impractical, as the response thereto, if any, would be too sporadic, uncertain and negligible to make the solicitation effort financially or otherwise worthwhile. Under the above circumstances, it is obvious that the ordinance is prohibitory in its operation and effect.[5]

Unquestionably house-to-house solicitation of subscriptions for the American periodical press is a legitimate business. As the record indicates, this type of solicitation plays an important and indispensible role in the distribution and circulation of magazines and periodicals (R. 10). Also, the magazines and periodicals involved here are lawful and well known publications and enjoy second class mail privileges under the postal laws of the United States (R. 7).

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5. In **Freund on Police Power**, section 58 at page 53, it is stated "To allow some activity or business only under conditions so burdensome that it will be inevitably surrendered or abandoned, is virtually to prohibit it." In **Collins v. State of New Hampshire**, 171 U. S. 30, 34 (1898), a statute which permitted the sale of oleomargarine only if it were colored pink was held to be "prohibitory" in nature as the above condition would effectually prevent any sale. Also, in **Adams v. Tanner**, 244 U. S. 590, 593 (1917), a statute which made it illegal for private employment agencies to collect fees from persons using their services was held to be "one of prohibition, not regulation."

Moreover, there is nothing in the record to indicate that the appellant, or any other solicitors of Keystone, engaged in any improper conduct in their solicitation efforts in Alexandria. Indeed, the record expressly states that the appellant was arrested "solely on the ground that he had not obtained the prior consent" required by Penal Ordinance No. 500 (R. 7). The record also indicates that all solicitors of Keystone are carefully chosen and are especially trained to perform their solicitation work in a courteous and gentlemanly manner (R. 7, 8).

Also the record indicates that the National Association of Magazine Publishers, Inc., maintains a Central Registry Plan whereby subscription agencies, like Keystone, and publishers having their own field selling subscription organizations agree to register the name and address and description of each of their authorized solicitors. The Central Registry List is furnished from time to time to local police authorities, better business bureaus and chambers of commerce. Under this program, Keystone requires its solicitors to visit the local police authorities of each city or town and identify themselves before starting their solicitation work in such place (R. 8, 9).

A majority of the courts, which have considered the Green River type of ordinance, have declared the ordinance to be unconstitutional.[6] In these cases, the courts have

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6. **Prior v. White**, 132 Fla. 1, 180 So. 347, 116 A. L. R. 1176 (1938); **De Berry v. City of La Grange**, 62 Ga. App. 74, 8 S. E. 2d 146 (1940); **The City of Osceola, Iowa v. C. C. Blair**, 231 Iowa 770, 2 N. W. 2d 83 (1942); **City of Mt. Sterling et al. v. Donaldson Baking Co.**, 287 Ky. 781, 155 S. W. 2d 237 (1941); **Jewel Tea Co. v. Town of Bel Air et al.**, 172 Md. 536, 192 Atl. 417 (1937); **Jewel Tea Co. et al. v. City of Geneva et al.**, 137 Neb. 768, 291 N. W. 664 (1940); **N. J. Good umor, Inc v. Board of Com'rs. of Borough of Bradley Beach et al.**, 124 N. J. L. 162, 11 A. 2d 113; **City of McAlester et al v. Grand Union Tea Co. et al.**, 186 Okla. 477, 98 P. 2d 924 (1940); **City of Orangeburg v. Farmer**, 181 S. C. 143, 186

taken the position that the ordinance in its practical operation is an arbitrary, unreasonable and capricious use of the police power and, in effect, prohibits lawful occupations; or that house-to-house solicitation in fact is not a nuisance at all, or at most, merely a private nuisance and, therefore, not subject to abatement by the city under its police power.

The Supreme Court of Georgia in **De Berry v. City of La Grange**, 62 Ga. App. 74, 8 S. E. 2d 146 (1940), in holding a Green River type of ordinance unconstitutional, stated as follows (S. E. p. 152):

> "We do not mean to say that the individual is not entitled to the right of privacy and that, where he so manifests, he could not, himself, prevent a visitation by such named solicitors, for to persist after notice would be a trespass, nor do we mean to hold that in such cases a municipality could not aid by ordinance in the prevention of such a trespass. * * * We think that a person engaged in the business of soliciting sales, whether of commodities, books, insurance, etc., is engaged in a lawful occupation. * * * The penalty provided by this ordinance is not based on the conduct of the solicitor or person entering, nor is it limited to the night time, or other time. We can see why an ordinance preventing such solicitation after dark, or within certain limited hours, might have as a basis the prevention of criminals using this device to determine whether the occupant was at home in order to commit a larceny. The ordinance makes no requirement as to a license to be obtained after production of evidence of good character, or to any other safeguard for the protection of public safety, health, or morals, but in

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S. E. 783 (1936); **Ex parte Faulkner**, 143 Tex. Crim. Rep. 272, 158 S. W. 2d 525 (1942); **White v. Town of Culpeper**, 172 Va. 630, 1 S. E. 2d 269 (1939). See also **Real Silk Hosiery Mills v. City of Richmond**, 298 F. 126 (D. C. N. D. Cal., 1924).

effect prohibits and makes penal the going on the premises, irrespectively of character, respectability, or the fact that the householder might in fact desire the presence of such persons though no invitation or request had been previously issued. * * *"

A typical case invalidating a Green River Ordinance is **Prior v. White**, 132 Fla. 1, 180 So. 347, 116 A. L. R. 1176 (1938). In that case a representative of the Fuller Brush Company violated a Green River Ordinance of the City of New Smyrna. The Company introduced testimony that each of its representatives was thoroughly investigated before employment and that its representative did not in fact create a nuisance in soliciting orders. After pointing out that a public nuisance affects the public generally, the court stated as follows (beginning at A. L. R., page 1187):

"Tested by this rule, the act sought to be prohibited by the ordinance is manifestly not a public nuisance and therefore may not be punished as a crime * * *. It is an old common law principle that an indictment will lie only for a public nuisance, not for a private nuisance * * *. The act which the ordinance declared to be a public nuisance is in fact either no nuisance at all, or is at most merely a private nuisance * * *. Furthermore, if the solicitations of sales at private residences really constituted a public nuisance, in fact, then such solicitation could not be permitted even by those who required or invited them."

On the other hand, a few courts have held the Green River type of ordinance to be constitutional.[7] In these

7. See **McCormick v. City of Montrose**, 105 Colo. 493, 99 P. 2d 969 (1939); **City of Shreveport v. Cunningham**, 190 La. 482, 182 So. 649 (1938); **Sam Jones v. City of Alexandria**, 216 La. 923, 45 So. (2d) 79 (1950); **Green v. Town of Gallup**, 46 N. M. 71, 120 P. 2d 619 (1941); **People v. Bohnke**, 287 N. Y. 154, 38 N. E. 2d 478 (1941), Cert. denied 316 U. S. 667; **Town of Green River v. Bunger**, 50 Wyo. 52, 58 P. 2d 456 (1936),

cases, the courts have taken the unrealistic position that the ordinance is merely regulatory and not prohibitory; that it will safeguard householders from the lawless who might utilize house-to-house solicitation as a blind for criminal purposes; and that uninvited solicitation is a nuisance as it represents an invasion of a householder's right to privacy. In so doing, such courts consistently have failed to distinguish between a public and a private nuisance and overlooked the fact that house-to-house solicitation is not in fact a nuisance, but if it were, it would only be a private one for which the perpetrator could not be criminally prosecuted.

In **Town of Green River v. Bunger**, cited in Footnote No. 7, the appeal taken to this Court on due process and other constitutional grounds was summarily dismissed for want of a substantial federal question (300 U. S. 638). In that case, which involved the original Green River Ordinance, the Supreme Court of Wyoming sustained the ordinance, *inter alia*, as a valid exercise of police power on the ground that it protected the householder from annoyance and inconvenience. In the present case, the record indicates that some householders of the City of Alexandria are annoyed by house-to-house solicitation or do not desire any uninvited intrusion into the privacy of their homes (R. 6) or, as the Court below volunteered, that the lawless might utilize house-to-house solicitation as a blind for criminal purposes (R. 20, 21).

In **Martin v. City of Struthers**, 319 U. S. 141 (1943) Mr. Justice Black considered and rejected similar contentions to those mentioned above as justification for an ordinance forbidding visitation at any home for the purpose of distributing literature. In his opinion Mr. Justice Black (p. 147) pointed out that a householder, who did not desire unin-

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appeal dismissed 300 U. S. 638; **Town of Green River v. Fuller Brush Co.**, 65 F. 2d 112 (C. C. A. 10) 88 A. L. R. 177 (1933); **Breard v City of Alexandria**, 69 F. Supp. 722 (1947).

vited visitation at his home, could post his premises with appropriate warning signs; and that a municipality can by identification devices control the situation of criminals posing as canvassers.

Accordingly, it is apparent that local interests can easily be adequately safeguarded by the solution suggested by Mr. Justice Black. Under these circumstances, it is apparent that the ordinance in question is completely arbitrary in prohibiting direct-to-consumer selling, a method which has become such an important part of the country's economic picture, and which plays such an important role in the circulation and distribution of the American Periodical Press. Certainly, the **Bunger** case, decided before the widespread enactment of Green River Ordinances and before their practical, prohibitive and cumulative effect could possibly be forecast, is not a controlling authority on this issue at the present time.

III.

THE ORDINANCE VIOLATES THE COMMERCE CLAUSE.

Appellant submits that Penal Ordinance No. 500 to the extent that it applies to solicitors, like the appellant, who solicit orders for the purchase of goods (magazines in the present case) subsequently to be shipped interstate to the customer, violates the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).[8] This

8. In decisions arising under the Commerce Clause a sharp distinction is made between a solicitor or drummer and a peddler. A solicitor or drummer is an itinerant salesman, who merely solicits orders for goods, with or without the exhibition of samples, subsequently to be delivered in interstate commerce to customers. As will be pointed out later in the brief, a solicitor or drummer is considered to be an instrument of interstate commerce and therefore immune from municipal or state taxation or regulations. On the other hand a peddler is deemed to be engaged in intrastate

is true, because the practical operation of the ordinance, as applied to appellant and others similarly situated, imposes an undue and discriminatory burden upon interstate commerce and in effect is tantamount to a prohibition of such commerce.

In **Robbins v. Shelby County Taxing District**, 120 U. S. 489 (1887) the Court stated as follows (at page 497):

> "* * * The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. * * *"

It is clear beyond question that interstate commerce is involved in the present case. The stipulated facts leave no doubt about this.

Keystone Readers Service, Inc., a Pennsylvania corporation with its main office in the City of Philadelphia, is and has been for many years engaged on a national scale in house-to-house solicitation of subscriptions for nationally known and distributed magazines and periodicals.[9] Keystone operates under contracts with the publishers of

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commerce and is subject to municipal or state taxation or regulations. **Caskey Baking Co., Inc. v. Virginia**, 313 U. S. 117 (1941); **Wagner v. City of Covington**, 251 U. S. 95 (1919).

9. Keystone in the furtherance of its business has divided the United States into nine regional areas, each of which is in charge of a franchised regional representative, who in turn utilizes crews of solicitors who go from house-to-house in various cities and towns in the regional area and solicit subscriptions for magazines and periodicals. Such solicitors are not permanently assigned to any particular city or town but move from locality to locality in their regional area in carrying on their solicitation activities. Such solicitors normally spend one or two days in each city or town depending upon its size (R. 7, 9).

such magazines and periodicals, all of whom are located outside of the State of Louisiana (R. 7).

Appellant, a resident of and having his headquarters at Dallas, Texas, is a regional representative of Keystone and is, and has been for many years, engaged in house-to-house solicitation of subscriptions for such magazines and periodicals. Neither the appellant nor any other solicitors of Keystone at any time make deliveries of any magazines or periodicals. Each subscription order is sent by mail through the main office of Keystone to the proper publisher, who, upon acceptance of same, sends the particular magazines or periodicals by mail directly to the new subscriber. Appellant was engaged in such house-to-house solicitation in the City of Alexandria at the time of his arrest (R. 7, 9, 10).

In considering the validity of the ordinance under the Commerce Clause, the practical operation of the regulation, actual or potential, rather than its descriptive label or formal character, is determinative of this question. See **Nippert v. City of Richmond**, 327 U. S. 416, 424 (1946). Accordingly, it is no answer to this question merely to say, as the Louisiana Supreme Court did, that the ordinance on its face does not prohibit house-to-house solicitation but merely regulates the manner in which it may be done, or that no license or tax is involved, or that it is not discriminatory in that it applies to all solicitors, whether they are soliciting intrastate or interstate business (R. 21). It is the actual and potential effect of the ordinance upon interstate commerce that is the nub of the question.

In a long line of decisions, commonly known as the "drummer decisions", beginning with **Robbins v. Shelby County Taxing District**, 120 U. S. 489 (1887) and culminating with **Nippert v. City of Richmond**, 327 U. S. 416 (1946),[10]

10. See also, **Corson v. Maryland**, 120 U. S. 502 (1887); **Brennan v. Titusville**, 153 U. S. 289 (1894); **Asher v. Texas**, 128 U. S. 129 (1888); **Stoutenburgh v. Hennick**, 129 U. S.

the United States Supreme Court has protected the solicitor or drummer of interstate business from state or municipal taxation or license fees or bonding requirements.

In these cases, the Supreme Court has consistently held that the act of solicitation is an essential and initial step for bringing about interstate commerce; that the imposition of a tax or a fixed license fee or a bonding requirement upon solicitors, particularly itinerant solicitors, involves inherently too many probabilities and actualities for exclusion of and discrimination against interstate commerce; and that provincial interests and local political power are at their maximum weight in bringing about this type of legislation in order to protect local business interests from interstate competition.

Penal Ordinance No. 500 involves, actually and potentially, the same exclusionary and discriminatory effects on interstate commerce as the tax or license ordinances held to be invalid in the "drummer" cases.

In the "drummer" cases, the imposition of the taxes or license fees upon the act of solicitation—the initial phase of interstate commerce—was deemed to have too many actual and potential possibilities of exclusion and discrimination. As the court pointed out in the **Nippert** case (327 U. S. 429), in many instances "the commerce is stopped before it is begun." Penal Ordinance No. 500 likewise imposes a direct burden upon the act of solicitation with similar actual and potential possibilities of exclusion and discrimina-

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141 (1889); **Stockard v. Morgan**, 185 U. S. 27 (1902); **Caldwell v. North Carolina**, 187 U. S. 622 (1903); **Rearick v. Pennsylvania**, 203 U. S. 507 (1906); **Dozier v. State of Alabama**, 218 U. S. 124 (1910); **Stewart v. People of the State of Michigan**, 232 U. S. 667 (1914); **Davis v. Commonwealth of Virginia**, 236 U. S. 697 (1915); **Crenshaw v. State of Arkansas**, 227 U. S. 389 (1913); **Rogers v. State of Arkansas**, 227 U. S. 401 (1913); **Real Silk Hosiery Mills v. City of Portland**, et al., 268 U. S. 325 (1925); and **Best & Company, Inc. v. Maxwell**, 311 U. S. 454 (1940).

tion by requiring as a condition precedent to house-to-house solicitation the procurement of the prior consent of householders before the solicitation may be made.

Keystone Readers Service, Inc., and its solicitors, as well as other soliciting agencies, are unable to engage in house-to-house solicitation in accordance with the requirements of Penal Ordinance No. 500. The solicitors of Keystone have a low price unit to sell (subscription prices range generally from $2 to $6 per year) and normally spend one or two days in each city or town depending upon its size. Neither the mail nor the phone is used in the solicitation effort (R. 9, 10). The present method of operation by Keystone and its itinerant solicitors—which as a result of experience has become well established generally in the magazine industry—now utilizes the maximum time, effort and expense that can be economically devoted to each city or town and to each prospective sale. According to the stipulation of facts, the present method of operation by Keystone and its solicitors is the most effective and economical method (R. 10).

Any attempt to procure the prior consent required by the ordinance would require the extensive use of the mail, or the telephone, or both,[11] and the itinerant solicitors to remain for a much longer period of time in each city or town than at present. The resulting inordinate amount of

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11. The ordinance does not specify how this prior consent must be obtained; however, the ordinance in question has been interpreted to require the prior consent to be obtained by the utilization of the mail or the telephone. See **Breard v. City of Alexandria**, 69 F. Supp. 722 (1947) at page 726, the reasoning of which was adopted and cited with approval by the Supreme Court of Louisiana in **City of Alexandria v. Jones**, 216 La. 923, 45 So. (2d) 79 (1950). In **Town of Green River v. Bunger**, 50 Wyo. 52, 58 Pac. (2d) 456 (1936), appeal dismissed 300 U. S. 638, an identical ordinance was held to preclude a solicitor from going to a house for the purpose of obtaining such prior consent.

time, effort and expense would eliminate any financial return from the solicitation effort. In addition, any such attempt to procure the prerequisite consent required by the ordinance would be completely impractical as the response thereto, if any, would be too sporadic, uncertain and negligible to make the solicitation effort financially or otherwise worthwhile.

Unquestionably a large volume of interstate business today stems from house-to-house solicitation. This is particularly true in the case of the magazine industry. As the record shows (R. 10) field subscription solicitation regularly accounts for from 50% to 60% of the total annual subscription circulation of nationally distributed magazines and more than 30% of the total amount of the annual circulation per issue of such magazines is attributable to field subscription solicitation, as distinguished from direct-mail subscriptions and single-copy newsstand sales. Accordingly, it is manifest that house-to-house solicitation plays an indispensable and important role in the distribution and circulation of the American periodical press. Obviously, the ordinance in its practical operation has a substantial exclusionary effect upon interstate commerce.

The actual and potential excluding effects of the ordinance become more apparent and are magnified many times by recalling that the ordinance is a municipal one. Itinerant solicitors, like the appellant, moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable.

The record indicates that such ordinances are becoming very fashionable. Thus, the record indicates that such ordinances were enacted in over 400 cities throughout the nation during the period from 1935 to 1939; that many additional cities and towns have enacted such ordinances since 1939 particularly since World War II; that Keystone solicitors encounter these ordinances most frequently in the southern and western states; and that practically

every city and important town in the State of Louisiana has adopted such an ordinance (R. 10).[12]

A similar potential and actual cumulative effect of the local ordinances involved in the "drummer" cases was recognized and condemned in **Nippert v. City of Richmond**, 327 U. S. 416 (1946). Mr. Justice Rutledge discussed this cumulative effect as follows (page 429):

> "* * * But the cumulative effect, practically speaking, of flat municipal taxes laid in succession upon the itinerant merchant as he passes from town to town is obviously greater than that of any tax of state wide application likely to be laid by the legislature itself. And it is almost as obvious that the cumulative burden will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State or the salesman who operates within a single community or only a few. The drummer or salesman whose business requires him to move from place to place * * * would find the cumulative burden of the Richmond type of tax eating away all possible return from his selling * * * [and] * * * can only mean the stoppage of a large amount of commerce which would be carried on * * * in the absence of the tax * * *".

Moreover, the ordinance is discriminatory against interstate commerce in favor of local competing business because of its exclusionary and prohibitory effects upon interstate commerce.[13] This discriminatory effect upon in-

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12. See also "**Municipal Legislative Barriers to a Free Market**" by John McIntire and Charles S. Rhyne published in 8 **Law and Contemporary Problems** (Duke University) page 374 (1941).

13. See also article by A. L. Jensen "**Burdening Interstate Direct Selling Under Claims of State Police Power**," 12 **Rocky Mountain Law Review** 257. Mr. Jensen in discussing the Green River type of ordinance stated at page 263: "* * * If however, this new legal approach to an

terstate commerce invalidates the ordinance despite the fact that it applies to all solicitors, whether they are soliciting intrastate or interstate business. See **Robins v. Shelby County Taxing District**, 120 U. S. 489, 497 (1887); **Nippert v. City of Richmond**, 327 U. S. 416, 431, 432 (1946).

As pointed out in **Best & Company, Inc. v. Maxwell**, 311 U. S. 454 (1940), in invalidating a license tax on "drummers", (page 455):

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. * * *"

The reason for the popularity of the Green River type of ordinance is due to the fact that it curbs interstate direct selling in favor of local competing business. Accordingly, this type of ordinance is usually adopted through the influence of local commercial interests.[14] This was equally true of the ordinances invalidated in the "drummer" cases. As this court pointed out in the **Nippert** case (327 U. S. at page 434):

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old problem be again unmasked as primarily another subterfuge of local merchants, under the false guise of shielding the people from a so-called public nuisance, to thus strike effectively at interstate competition that it too ought to be struck down as unconstitutional, as all other previous similar attempts have been."

14. See article by A. L. Jensen, "**Burdening Interstate Direct Selling under Claims of State Police Power**", 12 **Rocky Mountain Law Review** 257. Mr. Jensen in discussing the Green River type of ordinance stated at page 269: "* * * A careful investigation in numerous cities in which the Green River ordinance has been passed has, without exception, revealed that it was not the citizens generally but the local retailers who initiated and lobbied the ordinance to adoption. This vital fact * * * reveals the true purpose and effect of the Green River ordinance . . ." See also

"The tax here in question inherently involves too many probabilities, and we think actualities, for exclusion of or discrimination against interstate commerce, in favor of local competing business, to be sustained in any application substantially similar to the present one. Whether or not it was so intended, those are its necessary effects. Indeed, in view of that fact and others of common knowledge, we cannot be unmindful, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences or that in fact this is often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against. * * *"

In view of the foregoing actual and potential exclusionary and discriminatory effects of the ordinance upon interstate commerce, the fact that the ordinance purports to be an exercise of the police power will not save it.

It is well established that in the absence of conflicting legislation by Congress, there is a residuum of power in

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Hearings before the Temporary National Economic Committee, 76th Cong. 2d Sess. Pt. 29, pp. 15967-975. This fact has also been recognized and given proper weight in cases which have declared the ordinance to be unconstitutional. See for example, **Prior v. White**, 132 Fla. 1, 15, 180 So. 347, 353 (1938); **McCormick v. City of Montrose**, 105 Colo. 493, 508, 99 P. 2d 969, 976 (1939); **Donley v. City of Colorado Springs**, 40 F. Supp. 15, 18 (D. Colo. 1941); **White v. Culpeper**, 172 Va. 630, 638, 1 S. E. (2d) 269, 273 (1939); **Jewel Tea Co. v. Town of Bel Air**, 172 Md. 536, 540, 192 Atl. 417, 419 (1937); **City of Orangeburg v. Farmer**, 181 S. C. 143, 150, 186 S. E. 783, 785 (1936).

the states to regulate matters of local concern which nevertheless in some measure affect interstate commerce; provided, however, the impact of such regulations on the national commerce does not seriously interfere with or discriminate against its operation, or there is no need of national uniformity with respect to such regulations. **Southern Pacific Co. v. Arizona**, 325 U. S. 761, 767 (1945); **Morgan v. Virginia**, 328 U. S. 373, 377 (1946).

Moreover, this Court has consistently rebuffed attempts of the states or municipalities to advance their own commercial interests or to protect their own inhabitants from out-of-state competition by curtailing under the guise of the police power the movement of articles of commerce, either into or out of the state. **H. P. Hood & Sons, Inc. v. DuMond**, 336 U. S. 525 (1949); **Baldwin v. G. A. F. Seelig, Inc.**, 294 U. S. 511 (1935); **Dean Milk Company v. City of Madison, Wisconsin**, 19 **United States Law Week** 4087 (U. S., decided January 16, 1951). As has already been demonstrated, the practical effect of the Green River type of ordinance in question is to erect a trade barrier around every municipality adopting it to the extent interstate commerce is excluded which would otherwise come into the municipality as the result of the method of direct selling.

In **Town of Green River v. Bunger**, 50 Wyo. 52, 58 P. (2d) 456 (1936), an appeal taken to this Court on interstate commerce and other constitutional grounds was summarily dismissed for want of a substantial federal question (300 U. S. 638). In that case, which involved the original Green River Ordinance, the Supreme Court of Wyoming sustained the ordinance, inter alia, as a valid exercise of the police power which had only an incidental effect upon interstate commerce. Certainly, the **Bunger** case, decided back in 1936 before the widespread enactment of Green River Ordinances and before their actual and cumulative effect upon interstate commerce could possibly be forecast, is not a controlling authority on this issue at the present time.

Particularly is this so in view of the underlying reasoning of the subsequent **Nippert** case, *supra*, and the other decisions of this Court cited above.

IV.

ORDINANCE AS APPLIED TO PERSONS SOLICITING SUBSCRIPTIONS FOR LAWFUL MAGAZINES AND PERIODICALS, IS UNCONSTITUTIONAL AND VOID AS AN ABRIDGMENT OF FREEDOM OF SPEECH AND OF THE PRESS.

Appellant submits that Alexandria Penal Ordinance No. 500, as applied to appellant and other solicitors of subscriptions for lawful magazines and periodicals, violates Amendments I and XIV to the Constitution of the United States in that it abridges the freedom of speech and of the press. This is true because the ordinance places an arbitrary, unreasonable and undue burden upon a well established and essential method of distribution and circulation of lawful magazines and periodicals and, in effect, is tantamount to a prohibition of the utilization of such method.

In **Lovell v. City of Griffin**, 303 U. S. 444 (1938), Mr. Chief Justice Hughes stated as follows (page 450):

> "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action. Gitlow v. New York, 268 U. S. 652, 666; Stromberg v. California, 283 U. S. 359, 368; Near v. Minnesota, 283 U. S. 697, 707; Grosjean v. American Press Co., 297 U. S. 233, 244; De Jonge v. Oregon, 299 U. S. 353, 364. See, also Palko v. Connecticut, 302 U. S. 319. It is also well settled that municipal ordinances adopted under state authority constitute state action and are within

the prohibition of the amendment. Raymond v. Chicago Union Traction Co., 207 U. S. 20; Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278; Cuyahoga River Power Co. v. Akron, 240 U. S. 462."

It is well settled that the constitutional guarantee of freedom of speech and of the press comprehends distribution and circulation, as well as publication. **Ex Parte Jackson**, 96 U. S. 727, 733 (1877); **Grosjean v. American Press Co.**, 297 U. S. 233, 250 (1936); **Lovell v. City of Griffin**, 303 U. S. 444, 452 (1938); **Martin v. City of Struthers**, 319 U. S. 141, 146 (1943); **Winters v. New York**, 333 U. S. 507, 518 (1948).

As stated by Chief Justice Hughes in **Lovell v. City of Griffin**, 303 U. S. 444 (1938), at page 452:

> "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Ex Parte Jackson, 96 U. S. 727, 733. The license tax in Grosjean v. American Press Co., supra [297 U. S. 233], was held invalid because of its direct tendency to restrict circulation."

It is also well settled that the fundamental rights of free speech and of free press extend uniformly to individuals and corporations, to secular and business activities, as well as religious and political ones. **Near v. Minnesota**, 283 U. S. 697 (1931); **Thomas v. Collins**, 323 U. S. 516, 531 (1945); **Winters v. New York**, 333 U. S. 507, 509-510 (1948).

Thus, in **Thomas v. Collins**, 323 U. S. 516 (1945) the Court, per Mr. Justice Reed, said at page 531:

> "* * * Great secular causes, with small ones, are guarded. The grievances for redress of which the

right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.

"The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge, as Texas does, that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so. * * *"

Moreover, it is well settled that magazines and periodicals are within the scope of the protection afforded by the constitutional guarantees of free speech and a free press. **Winters v. New York**, 333 U. S. 507, 510 (1948); **Grosjean v. American Press Co.**, 297 U. S. 233, 250 (1936); **Lovell v. Griffin**, 303 U. S. 444, 452 (1938). In the **Grosjean** case, the court stated as follows at page 250:

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; * * *"

In the present case, the record shows (R. 7) that the appellant, at the time of his arrest for violating Alexandria Penal Ordinance No. 500 was engaged in house-to-house solicitation of subscriptions for nationally known and distributed periodicals, including Saturday Evening Post, Ladies Home Journal, Newsweek, Cosmopolitan, and other well known magazines. Appellant is a regional rep-

resentative of Keystone Readers Service, Inc. (R. 10). Keystone is engaged on a national scale in house-to-house solicitation of subscriptions for such nationally known magazines and periodicals. Keystone operates under contracts with the publishers of such magazines and periodicals (R. 7).

Each issue of such magazines and periodicals contains information of a public character, fiction, advertising, news on political, social and economic question., and material devoted to literature, history, current events, industry, the sciences and arts; and, as such, the magazines and periodicals enjoy second class mail privileges under the Postal Laws of the United States (R. 7).[15] In **Hannegan v. Esquire, Inc.**, 327 U. S. 146 (1946), Mr. Justice Douglas, in discussing the second class mailing privilege, pointed out that the favorable second class rates were granted by Congress for the purpose of encouraging "the distribution of periodicals which disseminated 'information of a public character' or which were devoted to 'literature, the sciences, arts, or some special industry', because it was thought that those publications as a class contributed to the public good."

Accordingly, appellant was not engaged in the sale or distribution of mere commercial advertising matter. See **Valentine v. Chrestensen**, 316 U. S. 52 (1942).

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15. § 14 of the **Classification Act of 1879**, 20 Stat. 359, 48 Stat. 928, 39 U. S. C. § 226 provides in part as follows: "Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows . . . Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

Newsstands, advertising and mail solicitation all play valuable roles in the distribution and circulation of magazines and periodicals. In addition, house-to-house solicitation for subscriptions plays an indispensable and important role in the distribution and circulation of the American periodical press. Some publishers maintain their own field selling organizations for this purpose and other publishers utilize soliciting agencies like Keystone Readers Service, Inc. for this purpose (R. 8, 10).

House-to-house solicitation of subscriptions for magazines and periodicals is not a fly-by-night operation but is a substantial one. As the record shows, field subscription solicitation regularly accounts for from 50% to 60% of the total annual subscription circulation of nationally distributed magazines and periodicals and more than 30% of the total average annual circulation per issue of such magazines and periodicals is attributable to field subscription solicitation, as distinguished from direct-mail subscriptions and single-copy newsstand sales (R. 10). During the year 1948, the total subscription value of subscriptions obtained by Keystone solicitors throughout the country amounted to $5,319,423.40 (R. 7).

Appellant has already demonstrated under prior headings, particularly under the heading "Interstate Commerce", that Alexandria Penal Ordinance No. 500 is so unduly burdensome as to be tantamount to a prohibition of house-to-house solicitation of subscriptions for nationally known magazines and periodicals. In **Zimmerman v. Village of London, Ohio**, 38 F. Supp. 582 (D. C. S. D. Ohio E. D., 1941), the Court expressly held this type of ordinance to be a "virtual prohibition" upon distribution and circulation and a violation of the guarantee of freedom of the press. Since this form of selling effort is an indispensable and important method of distribution and circulation of the American periodical press, it is manifest that the application of the ordinance to appellant and other persons soliciting sub-

scriptions for lawful magazines and periodicals directly abrides fredom of speech and of the press.

Assuming that the city of Alexandria may adopt or enact reasonable police regulations as to the time and manner of solicitation within the city limits, appellant submits that it cannot, consistently with the guarantees of the First and Fourteenth Amendments, restrict or prohibit one of the traditional and most important methods of distributing and circulating the American Periodical Press. The fact some householders of the City of Alexandria are annoyed by house-to-house solicitation or do not desire any uninvited intrusion into the privacy of their homes (R. 6) or, as the Court below volunteered, that the lawless might utilize house-to-house solicitation as a blind for criminal purposes (R. 20), affords no justification for suppressing magazine subscription solicitation in the manner attempted by the ordinance in question.

In the case of **Martin v. City of Struthers**, 319 U. S. 141 (1943), Mr. Justice Black, in the majority opinion, considered and rejected similar contentions to those mentioned above as justification for a municipal ordinance forbidding any person to knock on doors, ring door bells or otherwise summon to the door the occupants of any residence for the purpose of distributing to them handbills, circulars or advertising matter. In holding the ordinance "invalid because in conflict with the freedom of speech and press", Mr. Justice Black, quoting from **Schneider v. State**, 308 U. S. 147, 161 (1939), pointed out (page 144) that the Court must "be astute to examine the effect of the challenged legislation" and must "weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation."

Mr. Justice Black then stated as follows (beginning at page 146):

"Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

"Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away. The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case, the problem must be worked out by each community for itself with due respect for the constitu-

tional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors from the home."

Accordingly, adequate and reasonable alternative methods are so easily available to safeguard local interests affected by house-to-house solicitation, it is clear that the ordinance in question can not be justified in view of its restrictive and prohibitive impact upon freedom of speech and press.

As Mr. Justice Black pointed out in the **Martin** case, such matters can be so easily controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that the ordinance could serve no purpose other than abridgment of Freedom of Speech and Press. These householders, who do not wish solicitors to enter upon their property have an effective remedy through the "traditional" method of posting "no trespass" signs. Furthermore, this method may be properly implemented, consistently with constitutional guarantees, by the adoption and enforcement of criminal "trespass after warning" statutes (see **Martin** case, supra at pages 147-148; also see **City v. Martin**, 199 La. 39, 5 So. 2nd 377). Thus, the decision as to whether solicitors may lawfully call at a home would be left "where it belongs—with the homeowner himself"; and the unlawful usurpation by the city of the rights of home-owners generally, as well as the unlawful abridgment of the rights of free speech and press, entirely avoided.

Where legislative abridgment of Freedom of Speech and Press is asserted, the "rational basis" test of due process is not sufficient. These guaranteed freedoms may not be infringed on such slender grounds. They are susceptible of restriction only to prevent clear and present danger to the public interest. **Thomas v. Collins**, 323 U. S. 516, 530 (1945); **Schneider v. State**, 308 U. S. 147, 161 (1939).

The reasons previously indicated for the adoption of the ordinance in question certainly do not constitute a clear and present danger sufficient to abridge freedom of speech and press in the manner the ordinance in question does.

Accordingly, appellant submits that Alexandria Penal Ordinance No. 500, which, as has been previously pointed out, is prohibitive in effect, abridges Freedom of Speech and of the Press in so far as it applies to solicitors of subscriptions for lawful magazines.

CONCLUSION.

For the reason herein and above stated, appellant respectfully submits that the judgment entered by the Supreme Court of Louisiana must be reversed.

Respectfully submitted,

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